

NOTICE OF INTENT

Department of Environmental Quality Office of the Secretary

Under the authority of the Louisiana Environmental Quality Act, La. R.S. 30:2001 et seq., and in accordance with the provisions of the Administrative Procedure Act, La. R.S. 49:950, et seq., the secretary gives notice that rulemaking procedures have been initiated to amend the Office of the Secretary regulations, LAC 33:I.Chapter 11 (Log # OS022).

This proposed rule establishes procedures for issuance of declaratory rulings by the Department of Environmental Quality on significant matters when a request for a declaratory ruling has been received by the department. Promulgation of this rule is required by La. R. S. 30:2050.10.

This proposed rule meets the exceptions listed in R.S. 30:2019 (D) (3) and R.S.49:953 (G) (3); therefore, no report regarding environmental/health benefits and social/economic costs is required.

A public hearing will be held on June 26, 1997, at 1:30 p.m. in the Maynard Ketcham Building, Room 326, 7290 Bluebonnet Boulevard, Baton Rouge, LA 70810. Interested persons are invited to attend and submit oral comments on the proposed amendments. Should individuals with a disability need an accommodation in order to participate please contact Patsy Deaville at the address given below or at (504) 765-0399.

All interested persons are invited to submit written comments on the proposed regulations. Commentors should reference this proposed regulation by OS022. Such comments should be submitted no later than July 3, 1997, at 4:30 p.m., to Patsy Deaville, Investigations and Regulation Development Division, Post Office Box 82282, Baton Rouge, LA 70884 or to fax number (504) 765-0486. Copies of this proposed regulation can be purchased at the above referenced address. You may contact the Investigations and Regulation Development Division at (504) 765-0399 for pricing information. Check or money order is required in advance for each copy of OS022.

This proposed regulation is available for inspection at the following DEQ office locations from 8:00 a.m. until 4:30 p.m.: 7290 Bluebonnet Boulevard, 4th floor, Baton Rouge, LA 70810; 804 31st Street, Monroe, LA 71203; State Office Building, 1525 Fairfield Avenue, Shreveport, LA 71101; 3519 Patrick Street, Lake Charles, LA 70605; 3501 Chateau Boulevard West Wing, Kenner, LA 70065; 100 Asma Boulevard, Suite 151, Lafayette, LA 70508. This regulation is also available on the Internet at <http://www.deq.state.la.us/olae/irdd/olaeregs.htm>.

Herman Robinson
Assistant Secretary

Title 33

ENVIRONMENTAL QUALITY

Part I. Office of the Secretary

Subpart 1. Departmental Administrative Procedures

Chapter 11. Declaratory Rulings

§1101. Purpose

This Chapter establishes procedures for issuance of declaratory rulings by the Department of Environmental Quality on significant matters when a request for a declaratory ruling has been received by the administrative authority. All requests for declaratory rulings shall be governed by the Louisiana Environmental Quality Act (in particular, R.S. 30:2050.10), the Administrative Procedure Act (in particular, R.S. 49:963), and this Chapter. This Chapter also establishes procedures for related matters such as, but not limited to, appeals related to declaratory rulings.

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2050.10.

HISTORICAL NOTE: Promulgated by the Department of Environmental Quality, Office of the Secretary, LR.

§1103. Definitions

The following terms used in this Chapter shall have the meanings listed below, unless the context otherwise requires, or unless specifically redefined in a particular section:

Aggrieved Person—person who has a real and actual interest that is or might be adversely affected by the agency action upon which a declaratory ruling is sought.

Administrative Authority—the secretary of the Department of Environmental Quality, or his or her designee.

Administrative Record—any and all documents, testimony, records, files, or materials submitted to the administrative authority or compiled by the administrative authority concerning a request for a declaratory ruling or a declaratory ruling.

Declaratory Ruling—a final agency action in writing, identified as a declaratory ruling, and issued by the department with respect to one or more of the following:

- a. the validity of a rule; or
- b. the applicability of any rule, order, or statute to any person, property, or existing state of facts or facts certain to arise.

Declaratory Rulings Clerk—the person who, directly or through his/her designee(s), maintains custody of and receives filings to the records of declaratory rulings.

Declaratory Rulings Officer—the secretary or a delegated assistant secretary responsible for issuing a declaratory ruling.

Department—the Louisiana Department of Environmental Quality.

Intervener—an aggrieved person to whom intervener status is granted by the declaratory rulings officer under LAC 33:I.1133.

Party—the department, a petitioner, or an intervener.

Petitioner—any person who formally requests a declaratory ruling in accordance with this Chapter.

Pleading—a petition, motion, response, request, or any statement of position filed with the declaratory rulings clerk in connection with a request for a declaratory ruling or a declaratory ruling.

Secretary—the secretary of the Department of Environmental Quality.

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2050.10.

HISTORICAL NOTE: Promulgated by the Department of Environmental Quality, Office of the Secretary, LR.

§1105. Severability

If any provision of these rules, or the application thereof, is held to be invalid, the remaining provisions of these rules and regulations shall not be affected, so long as they can be given effect without the invalid provision. To this end, the provisions of these rules are declared to be severable.

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2050.10.

HISTORICAL NOTE: Promulgated by the Department of Environmental Quality, Office of the Secretary, LR.

§1107. Conflicts

Except as otherwise required by statutory law, this Chapter shall exclusively govern procedures for the department's issuance of declaratory rulings on significant matters, and this Chapter supersedes all rules in conflict herewith.

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2050.10.

HISTORICAL NOTE: Promulgated by the Department of Environmental Quality, Office of the Secretary, LR.

§1109. Declaratory Rulings Officer

A. Unless otherwise provided by the secretary in writing, all declaratory rulings shall be issued by the secretary. The secretary may delegate the authority to issue declaratory rulings to the various assistant secretaries.

B. The secretary or designated assistant secretary, when issuing a declaratory ruling, shall be referred to as the declaratory rulings officer.

C. The declaratory rulings officer shall have the authority to regulate all matters concerning a request for declaratory ruling and to issue the declaratory ruling after concurrence as to legal sufficiency by the assistant secretary for the Office of Legal Affairs and Enforcement.

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2050.10.

HISTORICAL NOTE: Promulgated by the Department of Environmental Quality, Office of the Secretary, LR.

§1111. Duty To Maintain List

The secretary shall maintain, in a place accessible to the public in the Office of Legal Affairs and Enforcement, a list of all petitions for declaratory rulings and declaratory rulings and an index to the list. The list shall identify the petitioner, the matter to be decided, and when applicable, the location of the activity or facility that is the subject of the petition. The list shall also include the date on which the petition is

received, the date the secretary decides whether a declaratory ruling will be issued, the date the secretary sets for issuance of the ruling, the date the ruling issues, and the date of any request for modification or appeal.

AUTHORITY NOTE: Promulgated in accordance with R.S.
30:2050.10.

HISTORICAL NOTE: Promulgated by the Department of
Environmental Quality, Office of the Secretary, LR.

§1113. Declaratory Rulings Clerk

A. The administrative authority shall designate a person in the Office of Legal Affairs and Enforcement to serve as the declaratory rulings clerk, who shall be the official custodian of declaratory rulings records. The clerk shall maintain these records separately from other records of the department.

B. The declaratory rulings clerk, or his/her designee, is authorized to:

1. certify copies of official documents in his/her custody;
2. ensure distribution of all decisions and notices issued by the declaratory rulings officer;
3. receive all filings of petitions, rulings, and other pleadings or documents;

4. maintain a list of petitions for declaratory rulings and declaratory rulings and an index to the list in a place accessible to the public; and

5. perform other duties as assigned by the declaratory rulings officer.

AUTHORITY NOTE: Promulgated in accordance with R.S.
30:2050.10.

HISTORICAL NOTE: Promulgated by the Department of Environmental Quality, Office of the Secretary, LR.

**§1115. Requests for Declaratory Rulings in Accordance with R.S.
30:2050.10**

A valid request for issuance of a declaratory ruling is made by filing a written petition in accordance with LAC 33:I.1117 and 1137.

AUTHORITY NOTE: Promulgated in accordance with R.S.
30:2050.10.

HISTORICAL NOTE: Promulgated by the Department of Environmental Quality, Office of the Secretary, LR.

§1117. Petition Contents and Form

A. A petition requesting issuance of a declaratory ruling shall be in writing and shall contain the following information:

1. the name, address, and telephone number of the petitioner and whether the petitioner is a permittee;

2. identification of the specific rule or statute in question;

3. the exact question presented to the department for ruling;

4. a concise statement of all particular facts necessary and sufficient to accomplish the following:

a. to show the nature of the controversy or uncertainty and the manner in which the rule or statute on which the declaratory ruling is sought applies or potentially applies to petitioner; and

b. to answer the question presented to the department for ruling;

5. a statement identifying all other rules, statutes, orders, or statements (formal or informal) from officials, employees, or agents of any local, state, or federal government agency that are relevant to the question presented by the petitioner;

6. a statement of the reasons for submitting the petition, including a full disclosure of the petitioner's interest in obtaining the declaratory ruling;

7. a statement as to whether the question presented by the petitioner is presently pending before or under consideration

by the department or any other administrative, legislative, or adjudicative body;

8. a statement as to whether the petitioner has some other adequate legal remedy, which will terminate the controversy or remove any uncertainty as to the applicability to petitioner or the circumstances cited of the rule, order, or statute in question; and

9. an affidavit that verifies the facts stated in the petition are true and correctly stated, and the verification is based upon the documents attached to or identified in the petition or based upon the affiant's personal knowledge.

B. A petition for declaratory ruling shall be filed with the Office of Legal Affairs and Enforcement by either of the following methods:

1. personal delivery to the assistant secretary for the Office of Legal Affairs and Enforcement or the declaratory rulings clerk at department headquarters, fourth floor, 7290 Bluebonnet Boulevard, Baton Rouge, LA 70810; or

2. United States Mail as certified mail, return receipt requested to Declaratory Rulings Clerk, Office of Legal Affairs and Enforcement, Box 82282, Baton Rouge, LA 70884-2282.

C. A petition for declaratory ruling may be accompanied by a memorandum that urges the department to issue a declaratory ruling of specified content. Such memorandum should contain the

arguments therefor and any relevant authorities in support thereof. No memorandum shall exceed 25 pages in length.

D. In addition to these requirements, a petition must meet the requirements of LAC 33:I.1137.

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2050.10.

HISTORICAL NOTE: Promulgated by the Department of Environmental Quality, Office of the Secretary, LR.

§1119. Disposition of Petition

A. After determining whether any circumstances exist that preclude the issuance of a declaratory ruling under LAC 33:I.1121, the department shall, not later than 60 days after receipt of the petition, either:

1. issue a declaratory ruling;
2. deny the request for a declaratory ruling;
3. grant the request for a declaratory ruling and set a time within which the ruling will be issued; or
4. fail to respond to the petition, in which case the department's failure to respond shall be deemed to be a denial of the request for a ruling as well as a denial of the merits of the request.

B. All declaratory rulings and written denials of the requests for declaratory rulings issued by the department shall

contain an explanation of the relevant facts and conclusions that served as the basis for the ruling or the denial.

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2050.10.

HISTORICAL NOTE: Promulgated by the Department of Environmental Quality, Office of the Secretary, LR.

§1121. Circumstances In Which Declaratory Rulings May Not Be Issued

Circumstances in which declaratory rulings may not be issued include, but are not necessarily limited to:

1. lack of jurisdiction;
2. lack of clarity concerning the question presented;
3. the existence of pending or imminent litigation or administrative action or adjudication that may either answer the question presented by the petition or otherwise make an answer unnecessary;
4. the petition involves a subject, question, or issue that is the subject of a formal or informal matter or investigation currently pending before the department, a court, or other government agency;
5. the statute, rule, or order on which a declaratory ruling is sought is clear and not in need of interpretation to answer the question presented by the petition;

6. the facts presented in the petition are not sufficient to answer the question presented;

7. the petition fails to contain any of the information required by LAC 33:I.1117 or 1137;

8. the petitioner is not aggrieved by the rule or statute on which a declaratory ruling is sought;

9. the petition seeks a ruling on a moot or hypothetical question or will result in an advisory ruling or opinion; or

10. the question presented by the petition concerns the validity or constitutionality of a statute.

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2050.10.

HISTORICAL NOTE: Promulgated by the Department of Environmental Quality, Office of the Secretary, LR.

§1123. Stay of Action

The filing of a request for declaratory ruling shall not stay any other department action.

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2050.10.

HISTORICAL NOTE: Promulgated by the Department of Environmental Quality, Office of the Secretary, LR.

**§1125. Declaratory Rulings Initiated by the Secretary and
Modification of Rulings**

A. The secretary may issue a declaratory ruling setting forth the department's position with respect to any matter within its jurisdiction or authority or describing proposed agency action.

B. The declaratory rulings clerk shall give the petitioner whose declaratory ruling is being reversed or modified notice by certified mail return receipt of the reversal or modification.

C. The declaratory rulings clerk shall mail or hand deliver to any intervener a copy of the reversal or modification when issued.

AUTHORITY NOTE: Promulgated in accordance with R.S.
30:2050.10.

HISTORICAL NOTE: Promulgated by the Department of
Environmental Quality, Office of the Secretary, LR.

§1127. Effect of Declaratory Rulings

A. A declaratory ruling is not binding on the department except as to the parties and does not constitute a rule as defined in R.S.49:951 nor does its issuance require "rulemaking" as defined in R.S.49:951.

B. A declaratory ruling may be used by the petitioner as a defense in any enforcement proceeding brought by the department after the issuance of the ruling.

AUTHORITY NOTE: Promulgated in accordance with R.S.
30:2050.10.

HISTORICAL NOTE: Promulgated by the Department of
Environmental Quality, Office of the Secretary, LR.

§1129. Docket Number

At the time a request for issuance of a declaratory ruling is filed, it shall be assigned a docket number by the declaratory rulings clerk. The docket number shall be used on all subsequent documents filed in the matter. The fact that a request for declaratory ruling is docketed does not constitute a determination as to whether the request is granted nor as to its sufficiency or validity.

AUTHORITY NOTE: Promulgated in accordance with R.S.
30:2050.10.

HISTORICAL NOTE: Promulgated by the Department of
Environmental Quality, Office of the Secretary, LR.

§1131. Parties

- A. Parties in declaratory ruling proceedings may include:
1. the petitioner; and
 2. an intervener.
- B. Parties shall have the right to retain counsel to represent them, but shall not be required to do so.

AUTHORITY NOTE: Promulgated in accordance with R.S.
30:2050.10.

HISTORICAL NOTE: Promulgated by the Department of
Environmental Quality, Office of the Secretary, LR.

§1133. Intervention

A. An aggrieved person has the right to intervene as a party in a declaratory ruling, provided the proper petition for intervention is filed at least 15 days prior to the declaratory ruling and such intervention is not likely to create an undue broadening of the issues or otherwise unduly impede the resolution of the matter.

B. If more than one person or entity with the same or similar interests seeks to intervene, the declaratory rulings officer may limit participation to designated representatives.

C. A petition for intervention shall comply with the requirements of LAC 33:I.1137 and shall also state all facts necessary to demonstrate that the intervener is an aggrieved person, including but not limited to, all facts necessary to demonstrate its position, and the manner in which the rule, statute, or order in question does or does not apply to the intervener.

D. A petition for intervention must be accompanied by an affidavit that verifies the facts stated in the petition are true

and correctly stated and the verification is based upon the affiant's personal knowledge.

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2050.10.

HISTORICAL NOTE: Promulgated by the Department of Environmental Quality, Office of the Secretary, LR.

§1135. Consolidation and Separation of Petitions

A. When two or more petitions for declaratory ruling involve a common issue or issues of law or fact, they may be consolidated and considered as a single petition. In such cases all petitions shall be docketed under the lowest docket number.

B. Petitions may be separated to simplify the proceedings or to permit a more orderly disposition of the matters consolidated.

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2050.10.

HISTORICAL NOTE: Promulgated by the Department of Environmental Quality, Office of the Secretary, LR.

§1137. Pleadings: Form and Content

A. Pleadings shall:

1. state the name, mailing address, and telephone number of the person causing the pleading to be filed. In instances where the person filing a pleading is represented by

another person, that person's name, address, and telephone number shall be included in the pleading;

2. be legibly written in ink, typewritten, or printed with one-inch top, bottom, and side margins, and shall be on strong durable white paper, no larger than 8½ by 11 inches;

3. be double-spaced, have its pages numbered, and if customary, be divided into separate numbered paragraphs;

4. state clearly, concisely, and particularly all relevant facts that give rise to and support the relief sought;

5. when appropriate, identify any statute, rule, written statement of law or policy, decision, order, permit, license, or any other regulatory mechanism and the particular aspect of each upon which the pleading relies;

6. state clearly and concisely the relief or action sought;

7. be signed in ink by the party filing same or by his/her duly authorized agent or attorney. The signature of the person signing the document constitutes a certification that he or she has read the document and that, to the best of his/her knowledge, information, and belief, every statement contained in the document is true; and

8. certify that a copy of the pleading or document has been mailed or hand delivered, on or before the date it is filed with the declaratory rulings clerk, to all parties.

B. The heading shall be similar in format to and shall include the information contained in LAC 33:I.331.B.

C. Failure to comply with this Section shall not invalidate the pleadings, but may be grounds for denial of the request for issuance of a declaratory ruling. The declaratory rulings officer shall have discretion to rule whether pleadings are in substantial compliance with this Section, to require the amendment or supplementation of any pleading, or to take such other action as may be appropriate.

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2050.10.

HISTORICAL NOTE: Promulgated by the Department of Environmental Quality, Office of the Secretary, LR.

§1139. Filing of Pleadings and Documents

A. Any pleading, document, or other item that is being filed into the record maintained by the declaratory rulings clerk shall be filed by mail or hand delivery to the clerk.

B. All pleadings, documents, or other items shall be deemed filed on the date received by the declaratory rulings clerk.

C. An original and one copy of all pleadings and documents shall be filed unless otherwise specifically provided by a particular regulation or by order of the declaratory rulings officer.

AUTHORITY NOTE: Promulgated in accordance with R.S.
30:2050.10.

HISTORICAL NOTE: Promulgated by the Department of
Environmental Quality, Office of the Secretary, LR.

§1141. Computation of Time

In computing any period of time prescribed or allowed in this Chapter or the Louisiana Environmental Quality Act, R.S.30:2001, et seq., the day on which the designated period begins shall not be included. The last day of the designated period shall be included unless it is a Saturday, Sunday, or a legal holiday as provided in R.S.1:55, in which event the designated period shall run until the end of the next day that is not a Saturday, Sunday, or a legal holiday.

AUTHORITY NOTE: Promulgated in accordance with R.S.
30:2050.10.

HISTORICAL NOTE: Promulgated by the Department of
Environmental Quality, Office of the Secretary, LR.

§1143. Discovery

No discovery is allowed by or between the parties to proceedings concerning a petition for declaratory ruling.

AUTHORITY NOTE: Promulgated in accordance with R.S.
30:2050.10.

HISTORICAL NOTE: Promulgated by the Department of
Environmental Quality, Office of the Secretary, LR.

§1145. Judicial Review

A party seeking judicial review of a declaratory ruling shall comply with R.S.30:2050.21.

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2050.10, 2050.21.

HISTORICAL NOTE: Promulgated by the Department of Environmental Quality, Office of the Secretary, LR.

§1147. Termination of Proceedings

Issuance of a ruling or unconditional withdrawal of the request for a ruling terminates the proceedings related to a request or petition for declaratory ruling.

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2050.10.

HISTORICAL NOTE: Promulgated by the Department of Environmental Quality, Office of the Secretary, LR.

§1149. Entry and Notice of Rulings

A. Entry. The original of any declaratory ruling or order issued shall be filed with the declaratory rulings clerk who shall notify all parties of the decision or order.

B. Notice

1. When a declaratory rulings officer issues, reverses, or modifies a declaratory ruling, a copy shall be

served by certified mail return receipt requested upon the petitioner.

2. The declaratory rulings clerk shall also mail or deliver a copy of the ruling to any intervener and to any person who has on file with the declaratory rulings clerk a written request for notice that includes the information necessary to receive notice (including requester's name and address and the matter(s) about which requester desires notice).

3. Declaratory rulings or a summary of rulings shall be published in the *Louisiana Register*.

AUTHORITY NOTE: Promulgated in accordance with R.S. 30:2050.10.

HISTORICAL NOTE: Promulgated by the Department of Environmental Quality, Office of the Secretary, LR.